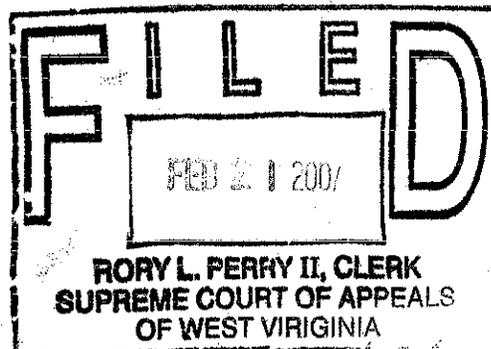


NO. 33223

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Plaintiff below, Appellee

MICHAEL CUMMINGS,

Defendant below, Appellant.

REPLY BRIEF OF APPELLANT MICHAEL CUMMINGS

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TABLE OF AUTHORITIES

Liichow v. State of Maryland, 288 Md. 502, 419 A.2d 1041 (1980).....2

Matthews v. Commonwealth, 218 Va. 1, 235 S.E.2d 306 (1977).....2

Scott v. Buck, 170 W.Va. 428, 294 S.E.2d 281 (1982).....3

State v. Chapman, 178 W. Va. 678, 363 S.E. 2d 755 (1987).....5

State v. Dudick, 158 W.Va. 629, 213 S.E.2d 458 (1975).....5

State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).....

State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974).....4

State v. Williams, 162 W.Va. 309, 249 S.E.2d 758 (1978).....3

I. THE CIRCUIT COURT ERRED IN NOT SUPPRESSING THE EVIDENCE THAT WAS FOUND IN THE SEARCH OF THE VEHICLE PERFORMED AFTER THE ILLEGAL SEARCH OF THE SMALL CONTAINER FOUND IN PETIONER'S POCKET.

A. Plain View Doctrine

The second of the four requirements to allow a warrantless search and seizure of items in "plain view" is that the item be in plain view and **that its incriminating character also be immediately apparent.** Even if the officer could have seen any of the contents of the yellow opaque bag in the back seat floor of the car and even though the trooper's training might give him reason to find "incriminating character" in cold medicine the plain view of cold medicine alone should not be probable cause allowing a warrantless search.

In addition, the actions taken by the officer show that either Trooper Cox did not see the boxes of cold medicine or if he did see the six boxes they were not so immediately incriminating to him that they would allow a plain view search. When Trooper Cox approached Appellant's vehicle he did not make any mention of what he saw in the car. In fact he merely continued on with an ordinary traffic stop and asked for a driver's license and other vehicle information. The real reason he found the cold medicine to have an incriminating character is because of the suspected drugs he found in the illegal search.

As previously pointed out in appellant's brief, seeing one item, such as cigarette papers, or pills, that could possibly be used in a crime does not lead to enough information to search an individual or vehicle. See *Matthews v. Commonwealth*, 218 Va.1 (1977); *Liichow v. State of Maryland*, 288 Md. 502 (1980).

B. Automobile Exception

The "automobile" exception requires (1) exigent circumstances precluding the obtaining of a warrant and (2) probable cause. The burden rests on the state to show by a preponderance of the evidence that a warrantless search falls within the authorized exceptions.

The State argues that officer safety concerns were exigent circumstances that allowed Trooper Cox to search the vehicle. Although officer safety might be an excuse to allow certain searches such as of bulging pockets, it is not an excuse for a warrantless automobile search. "The exigent circumstances are that unless the vehicle is detained and searched it will be driven away and, therefore, a warrant need not be obtained." *State V. Moore*, 165 W. Va. 837, 272 S.E. 2d 804 (1980).

As to the probable cause requirement, again, if a shopping bag containing cold medicine is enough probable cause to search an automobile, anyone who makes a trip to the pharmacy for cold medicine should be doubly sure he is driving home at a safe speed.

C. Evidence gathered after the trooper illegally searched the small container is a "fruit of the poisonous tree" search and should also be excluded.

The State argues that the trooper searched the vehicle, not because he found drugs in the pill case attached to the knife, but because of the independent plain view of cold medicine in the back seat floor of the car. Again the question is whether viewing cold medicine and nothing else is enough probable cause to allow a warrantless search. The state argues that it is enough and the defendant contends that it is not.

The State further argues that the "exigent circumstances" of officer safety, possible tampering with or destruction of evidence were independent reasons that permitted the search.

The Cummings, however, were in cuffs in the officer's car, so even if there were cases holding that these were exigent circumstances permitting a search, there is no way the Cummings at that point were threatening the officer's safety or able to destroy any evidence.

D. Voluntariness of Alleged Consent to Search

The State cites *State v. Buck*, 170 W. Va. 428, 294 S.E.2d 281 (1982) for the holding that a trial court's decision regarding the voluntariness of a consent to search will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence. In that case, however, the facts were that the parties were not under arrest or in custody, but merely at the police station for questioning.

The *Williams* case cited by the State actually held that defendant did not freely and voluntarily consent to search of his jacket but merely acquiesced to police demand to hand over his jacket, and trial court accordingly erred in admitting watch found in jacket into evidence. *State v. Williams*, 162 W. Va. 309, 315, 249 S.E.2d 758, 762 (1978). Here, as well, the response of Michael Cummings (Amy's alleged response is hearsay) to the officer's question if they minded if he searched the vehicle was also mere acquiescence on the part of the appellant. (See suppression hearing testimony Record p. 133)

The "totality of the circumstances" to be considered here, as the state's brief argues must be done to determine the voluntariness of a consent to search, are that Michael Cummings was in handcuffs and "secured" in the trooper's vehicle (Record p. 131) and his wife, Amy, (Record p. 132) also secured in the state car, allegedly replied in the negative to the question of whether they had a problem with the arresting officer looking in their vehicle. (Record p. 133). They were in custody due to the trooper's search and seizure of the drugs found in the small container, later

ruled inadmissible. The arrests were illegal and as held in *State v. Thomas*, 203 S.E.2d 445 (1974):

A suspect whose acquiescence to search is secured during police custody occurring by reason by an illegal arrest, or similar form of overt or subtle detention, is in no position to refuse to comply with the demands of the officer in whose custody he is, whether such demand is couched in the language of a polite request or direct order, and he cannot be held to have consented to the search voluntarily.

The State argues that Appellant was put into custody because of officer safety reasons. However, it is clear that the reason appellant was placed into custody was because Trooper Cox found on Appellant's person three pills and two baggies containing what looked like methamphetamine. The search that lead to this arrest was held illegal by the Trial Court and thus Appellant was under an illegal arrest. He was not in a position where he could give a valid consent. The State's brief argues that the officer had a right to arrest Amy because she was tampering with evidence, but the evidence with which she was accused of tampering and possibly destroying was later ruled inadmissible.

II. THE CIRCUIT COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGEMENT OF ACQUITTAL IN THAT THE WEIGHT OF THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A GUILTY VERDICT ON EITHER OF THE CHARGES ON WHICH THE APPELLANT WAS FOUND GUILTY.

A. There Is Absolutely No Connection Between Appellant and Any Evidence That Was Found In the Search of the Vehicle.

The State argues that circumstantial evidence in the case allowed the jury to infer that Appellant intended to operate a methamphetamine laboratory. However, the State is unable to show anything that connects Appellant to the evidence in the vehicle other than

the fact that he was driving the vehicle. The West Virginia Supreme Court has been clear when it has stated that mere proximity to evidence is not sufficient to convict a defendant of possession. Syllabus point 3 of *State v. Dudick*, 158 W.Va. 629 (1975) reads:

In West Virginia mere physical presence on premises in which a controlled substance is found does not give rise to a presumption of possession of a controlled substance, but is evidence to be considered along with other evidence demonstrating conscious dominion over the controlled substance.”

Furthermore, “The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant’s dominion and control.” Syl. pt. 3, *State v. Chapman*, 178 W.Va. 678 (1987)(quoting Syl. pt. 4 *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975)).

The State shows nothing to connect Appellant to the evidence found in the vehicle. No fingerprints were found on the bag to connect Appellant. A receipt was not found on Appellant. The state argues that Appellant was in “arms reach” but case law shows proximity does not matter when determining possession. Trooper Cox did find some pills and two baggies of methamphetamine on Appellant. However, this evidence was suppressed and thus cannot be used to connect Appellant to the other evidence.

Again, simply driving the vehicle that contained three people as well as cold medicine, matches and syringes should not be enough evidence to convict the appellant, Michael Cummings, of any crime. There was no evidence that Michael Cummings even knew these items were in the vehicle. He did not own the vehicle. The items were not beside him, but were in fact beside his wife’s feet in the back seat floor. There was no evidence that he had even looked into the floorboard behind the front seat. There were two other people in the automobile, one of whom was not even charged. No bags were found in appellant’s possession. A receipt was

found in the bag along with the cold medicine. No receipt was found on or near Michael Cummings nor was there any information on the receipt that was found that Michael Cummings had bought the items. As a matter of fact, the receipt showed an additional purchase of a perfumed body spray that the police officer admitted was probably not a purchase by Mr. Cummings. (Record 221) The third person in the car, who was not even charged with anything, was seated as close to the items as Mr. Cummings was. There was no other evidence adduced that Michael Cummings had any link whatsoever to the items found in the vehicle and alleged to be chemicals or equipment used to manufacture or ingest methamphetamine.

B. There was no evidence of any conspiracy except that the appellant was riding in the same car as the alleged co-conspirator.

The state attempted to prove the conspiracy charge with the trooper's opinion that Amy and Michael had both purchased the items in the car. An objection to this testimony was sustained and the jury instructed to disregard it. (Record 218, Tr. 75). There was testimony that Amy and Michael were wife and husband. There was no other evidence of a connection between Amy, Michael and the items in the bags in the car. The State argues that the overt act furthering the conspiracy was getting in the car with Amy, driving to Parkersburg and purchasing the items found in the car. As has been discussed in the preceding paragraphs there was no evidence presented at trial that could possibly connect Michael Cummings to any crime other than the speeding violation.

CONCLUSION

When looking at all of the admissible evidence even in a light most favorable to the state there was simply not enough evidence to convict Michael Cummings of attempting to operate a clandestine drug laboratory. This case turns on whether six one-dollar boxes of cold medicine,

containing doses that if taken consecutively as prescribed on the box would last twelve days, constitutes immediately incriminating evidence.

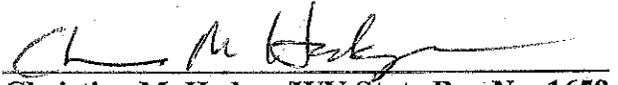
Therefore, for all or any of the reasons stated above the Appellant, Michael Cummings, asks the West Virginia Supreme Court to set aside the guilty verdict rendered against him or in the alternative to grant him a new trial.

**MICHAEL CUMMINGS,
Appellant, By Counsel.**


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CERTIFICATE OF SERVICE

I, Christine M. Hedges, do hereby certify that I have this day served the foregoing BRIEF TO SUPREME COURT by first class mail, postage paid, a true copy thereof, to Mark G. Sergeant, Prosecuting Attorney, P. O. Box 734, Spencer, WV 25276, and Benjamin F. Yancey, III, Attorney General's Office-Capitol, Building 1, Rm. W-435, 1900 Kanawha Boulevard, East, Charleston, WV 25305, this 20th day of February, 2007.


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